CHANG AH MEE

v.

JABATAN HAL EHWAL AGAMA ISLAM & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN
IAN HC CHIN J
[ORIGINATING SUMMONS NO: S24-56-1999]
11 DECEMBER 2002

ISLAMIC LAW: *Infants - Conversion to Islam - Whether requiring consent of both parents - Conversion effected upon consent given only by father - Whether unlawful - Infant a two-year old - Whether has not attained age of baligh - Sabah Administration of Islamic Law Enactment 1992, ss. 68, 69 - Law Reform (Marriage and Divorce) Act 1976 ss. 51(2), 88(3), 89(1) - Federal Constitution, art. 12(4)*

STATUTORY INTERPRETATION: *Construction of statutes - Legislative intent - Meaning of "Parents" - Sabah Administration of Islamic Law Enactment 1992, s. 68 - Whether referring to both father and mother*

This was an application by the plaintiff for a declaration that the conversion of her two year old child ('infant') to Islam, which was effected or solemnized by the 1st defendant with the consent only of the infant's father, was in contravention of the provisions of the Sabah Administration of Islamic Law Enactment 1992, ('the Enactment') and was hence null and void. Before the learned judge, arguments were put forth that since s. 68 of the Enactment had mandated the first defendant to obtain the consent of the 'parents' or 'guardian' of the infant, it was therefore incumbent on the first defendant to have obtained the consent of both the father and mother of the infant. This issue apart, it was argued that the said s. 68 further required that the convert, at the time of conversion, ought to have attained the age of baligh according to Islamic Law, and that being so, the conversion was unlawful as the infant was only two years old at the material time. On their part, the defendants contended that since art. 12(4) of the Constitution spoke of 'parent' in the singular form, 'parents' in s. 68 must therefore refer to either the father or the mother of the infant.

Held:

[1] The issue as to the legality of the conversion has nothing to do with religion but with the interpretation of the provisions of the Enactment, more particularly s. 68 thereof. (p 460 f)

[2] There is no merit in the argument that 'parents' in s. 68 of the Enactment ought to be read as a singular 'parent' so as to conform to art. 12(4) of the Constitution. The Constitution does not discriminate against the sexes and hence the term 'parent' in article 12(4) must necessarily mean both the father and the mother. To allow just the father or the mother to choose the religion would invariably mean depriving the other of the constitutional right under art. 12(4). Therefore the term 'parents' used in s. 68 does not conflict with art. 12(4) as that article confers the right on both the father and the mother. (p 462 b-c)

[3] Bearing in mind s. 51(2) of the Law Reform (Marriage and Divorce) Act 1976, which provides for the court's power, upon dissolution of the marriage, to make provisions for the support, care and custody of the children, and ss. 88(3) and 89(1) thereof, that provide for the custody of an infant child and the right of the custodian to decide all questions relating to the upbringing and education of the child, clearly, the right which the plaintiff would have had, had the husband not converted the infant to Islam, has been violated by the husband when he gave permission to the first defendant to have the infant converted. (p 462 e-i)

[4] By s. 69 of the Enactment, in order to embrace the Islamic faith, the infant must be able to utter in reasonably intelligible Arabic the two clauses of the Affirmation of Faith and to know their meaning as well. It is recognized by the Enactment that the person, in order to recite and to know the meaning, must be of the age of baligh as spoken of in s. 68 of the Enactment. Clearly, the infant herein is not of the age of baligh and the conversion is therefore against the Enactment. (pp 463 e & 464 d)

[Declaration granted.]

Case(s) referred to:

Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaik Zolkaffily Shaik Natar & Ors [2002] 3 CLJ 664 ***(refd)***

Legislation referred to:

Administration of Islamic Law Enactment (Sabah) 1992, ss. 68, 69
Federal Constitution, arts. 12(4), 75
Guardianship of Infants Ordinance (Cap. 54) s. 5
Law Reform (Marriage and Divorce) Act 1976, ss. 51(2), 88(3), 89(1)

For the plaintiff - Edwin Tsen; M/s Tan Pang Tsen & Co
For the 1st & 3rd defendants - Athmat Hassan
For the 2nd defendant - Razali Tazi

Reported by WA Sharif

JUDGMENT

Ian HC Chin J:

Introduction

This is an application, filed on 10 August 1999, by the plaintiff, Chang Ah Mee, who is the mother of one junior Staphie Khoo ("infant") for a declaration that the conversion on 17 July 1998 by the Jabatan Hal Ehwal Agama Islam Majlis Ugama Islam Sabah of her son to a Muslim be declared null and void.

Facts Of Case

In 1995 the plaintiff was married to one Khoo Tak Jin ("the father") out of which wedlock the infant was born in 1996. Then unbeknown to the plaintiff the father converted to the Islamic faith on 23 January 1998 and the infant was also converted on 17 July 1998 without the consent of the plaintiff. Then on 28 July 1998 the father obtained an order from the Syariah Lower Court declaring his marriage null and void and granting him custody of the infant but this order was subsequently reversed by the Syariah High Court on 4 November 1998. This High Court then on 13 November 1998 granted custody to the plaintiff pursuant to an application made in a pending proceeding. The facts present no problem. It is the jurisdiction of this court to hear the present application that is being called into question by all the defendants while the plaintiff questions the legality of the conversion of the infant to Islam which latter issue I will deal with first.

Legality Of Conversion

This issue has nothing to do with religion but with the interpretation of the provisions of a Sabah legislation called the Administration of Islamic Law Enactment 1992, more particularly s. 68 which reads:

> 68. For the purpose of this Part, a person who is not a Muslim may convert to Islam if he attains the age of baligh according to Islamic Law and provided that if a person is below eighteen (18) years of age consent shall be obtained from the parents or his guardian.

The term "parents" mentioned in that section is in the plural which literal and ordinary interpretation means the father and the mother (or persons acting as such) while the singular form would mean either the father or the mother. But that section also confer upon a guardian the right to give consent. The conjunction "or" indicates that either the parents or the guardian could give consent. The term "guardian" and his duties are dealt with extensively by the Guardianship of Infants Ordinance (Cap. 54) which contain provisions for the guardianship of infants. Before the amendment on 1 September 1999, s. 5 of the Ordinance gave the father the primary right over the person and property

of an infant but the amendment gave both the father and the mother the same and equal right but such right equal right is illusory unless it means that the husband and the wife must exercise them jointly, that is, it cannot be exercised by the one without the other save when the other has died. Therefore when the Administration of Islamic Law Enactment 1992, s. 68, refers to a guardian, it must be taken to mean both the mother and the father as they have equal right under the Guardianship of Infants Ordinance.

As for the matter of the choice of religion for an infant, the law is to be found not only in the Administration of Islamic Law Enactment 1992, *supra*, but also in art. 12 of the Constitution which says:

> Rights in respect of education
>
> 12 (1) Without prejudice to the generality of Article 8 there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth
>
> (a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or
>
> (b) in providing out of the funds of a public authority, financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).
>
> (2) Every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law; but it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose.
>
> (3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.
>
> (4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

It will be noticed that art. 12(4) speaks of "parent" in the singular form which led the defendants to argue that s. 68, when it requires the consent of both parents is inconsistent with art. 12(4) which requires the consent of a parent and that when an inconsistency occurs, the Constitution prevails and this is stipulated in art. 75 which reads:

> 75. If any State law is inconsistent with a federal law, the federal law shall prevail and the State aw shall, to the extent of the inconsistency, be void.

Thus, "parents" in the Enactment" shall have to be read as "parent", argued the defendants. But I am unable to accept that argument. The Constitution does not discriminate against the sexes and since the father and the mother have equal right over the person and property of an infant, the term "parent" in art. 12(4) must necessarily mean both the father and the mother if both are living. To construe otherwise would mean depriving, for example, a mother of her right as a parent to chose the religion of the infant under art. 12(4), if the father alone decides on the religion to be followed by the infant. To allow just the father or the mother to chose the religion would invariably mean depriving the other of the constitutional right under art. 12(4). Therefore, the term "parents" used in s. 68 does not conflict with art. 12(4) as art. 12(4) confers the right on both the father and the mother (when they are both living).

However, the plaintiff has one right which may not be easily discernible. That right can arise when the husband converted to Islam. The conversion of one spouse to Islam entitles the other party who has not converted to petition for divorce though the petition cannot be presented until the expiration of three months from the date of the conversion. The husband's conversion took place on 23 January 1998 while that of the infant on 28 July 1998 when she was only two years old. A petition for divorce was filed on date unknown and the custody of the infant was given to the plaintiff in January 2002. When such a petition is presented: "The court upon dissolving the marriage may make provision for the wife or husband, and for the support, care and custody of the children of the marriage, if any, and may attach any conditions to the decree of the dissolution as it thinks fit." (s. 51(2) of the Law Reform (Marriage and Divorce) Act 1976). The primary right of the father to be the guardian would be displaced when the court considers to whom custody of the infant would be given because s. 88(3) of the Law Reform (Marriage and Divorce) Act 1976 says:

> There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

Where custody is given to a spouse, it entitled the custodian to "decide all questions relating to the upbringing and education of the child" (s. 89(1) of the Law Reform (Marriage and Divorce) Act 1976 which, to my mind, would include deciding what religious education the infant should have. But that right, which the plaintiff would have had, had the husband not converted the infant to Islam, has been violated by the husband when he gave permission for the

1st defendant to have the infant, converted. But the plaintiff still has the right since the court has given her custody of the infant "to decide on all questions relating to the upbringing and education of the child". It is only in this manner, in my view, that the plaintiff can argue that her right was violate and that in the circumstances of this case, that is because of her right to custody and to decide on the religious education of the infant, that her consent should have been obtained. But then art. 12(4) does not appear to contain any restriction on the right of the husband to decide to have the infant converted at anytime, that is, even during the time when a right has accrued to the plaintiff to divorce him and to have custody of the infant, as a result of the husband's conversion to Islam. Now, we have a situation of the plaintiff having the right to decide on the religious education of the infant who does not want the child to undergo any religious education of the Islamic faith and can thus lawfully send the infant to any religious education other than Islam but yet have a child who has already been converted to Islam. Quite apart from that right of the plaintiff, the Koran (surah al-Baqarah, ayat 256I) also states that there shall be no compulsion in religion which means that the plaintiff and, through her, the infant cannot and should not be compelled to go to Islamic religious school.

A matter not discussed is the issue of whether there was a valid conversion. Section 69 of the Administration of Islamic Law Enactment 1992 spells out the requirements for conversion in these words:

> 69 (1) The following requirements shall be complied with for a valid conversion of a person to Islam:
>
> (a) the person must utter in reasonably intelligible Arabic the two clauses of the Affirmation of Faith;
>
> (b) at the time of uttering the two clauses of the Affirmation of Faith the person must be aware that they mean "I bear witness that there is no god but Allah and I bear witness that the Prophet Muhammad S.A.W. is the Messenger of Allah"; and
>
> (c) the utterance must be made of the person's own free will.
>
> (2) A person who is incapable of speech may, for the purpose of fulfilling the requirement of paragraph (a) of subsection (1), utter the two clauses of the Affirmation of Faith by means of signs that convey the meaning specified in paragraph (b) of that subsection.

So, quite apart from the consent from the parent or guardian being required, the infant, in this case a two-year old, must be able to utter in reasonably intelligible Arabic the two clauses of the Affirmation of Faith and to know their meaning as well. The two clauses look like this:

It is recognized by the Enactment that the person, in order to recite and to know the meaning must be of the age of baligh. I readily understand why learned counsel for the plaintiff would not understand what that term means but I expect the three learned counsel for the defendants to know its meaning and inform the court of it. They did not and in the end I have to go on my own to find out what that means which is not a difficult task because the court has a *Kamus Dewani*, 3rd edn, which defines baligh in Malay as being:

> Cukup umur atau dewasa (mengikut pandangan Islam, biasanya apabila mencapai umur antara 9-12 tahun bagi perempuan dan 12-15 tahun bagi lelaki.

Clearly then, baligh is the Arabic word meaning of full age or adulthood and in Islam as far as a boy is concerned it is between the age of twelve and fifteen while for a girl it is between the age of nine and twelve. It is, therefore, beyond argument that the infant is not of the age of baligh and the conversion is therefore against that Enactment.

Even if it is so, it was argued by the defendants, this court has no jurisdiction to say so which is the next issue I will concern myself with.

Jurisdiction To Declare Conversions As Being Against The Law

What is involved in this case is the interpretation of a state law and that is s. 69 of the Administration of Islamic Law Enactment 1992 and the Court of Appeal had only very recently in *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaik Zolkaffily bin Shaik Natar dan lain-lain* [2002] 3 CLJ 664 CA said that a civil court has the jurisdiction to do so even if the state law is one concerning the administration of Islamic Law.

Conclusions

I would therefore declare that the conversion by the 1st defendant of the infant Junior Staphie Khoo on 17 July 1998 to Islam, the naming of her as Faridah Ibrahim Khoo and the issuance of the certificate by the 2nd defendant in respect of the conversion and the naming is null and void as the conversion was against s. 68 of the Administration of Islamic Law Enactment as the infant being only two years old then has not attained the age of baligh. Costs to the plaintiff against all the defendants.